INDEX

PAGE

Opinion Below 1

Jurisdiction 1

Questions Presented 1-2

Statement 2

Reasons for Denying the Writ 7

Miscellaneous

Executive Order 9301 dated Feb. 9, 1943 (8 F. R. 1825) 3

IN THE

Supreme Court of the United States

THE UNITED STATES,

—against—

C. B. ROSS COMPANY, INC.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

The opinion of the Court of Claims (R. 28-32), has not yet been reported in the Court of Claims Reports but can be found in 74 Fed. Supp. 420.

Jurisdiction

The judgment of the Court of Claims was entered on December 1, 1947 (R. 32). A motion for a new trial was denied on March 1, 1948 (R. 32). The jurisdiction of this Court is invoked by Petitioner under the provisions of Section 3(h) of the Act of February 13, 1925, as amended.

Questions Presented

The Petitioner's statement of the alleged questions presented on this application is reminiscent of the old tactic of setting up a straw man so that the erector may easily knock him down. Such yeoman service does the Petitioner render to the Respondent when Petitioner would have it

appear that important questions of law are presented by the record in this case. The instant case is *sui generis* on the peculiar facts of our case and no argument by Petitioner can transform it into a class suit involving basic legal issues. Perhaps, in view of the apparent effort of the Petitioner to overstate the questions presented, it will be best to state the question in the language of the Court of Claims, *viz.*:

> "The plaintiff here, however, claims that the Government agreed to compensate it. The Government concedes that the Government agency which made the contract had the power to agree to reimburse the plaintiff, but says that it did not so agree, but only offered to do so if the plaintiff would satisfy certain conditions which, it says, the plaintiff did not do. We think the plaintiff did satisfy the conditions. The only one seriously in question is the one with regard to shortening the time of performance" (R. 29).

As indicated by the above, the sole question in the case was whether the conditions of the agreement were satisfied.

Statement

On or about December 16, 1942, Respondent as lowest competitive bidder entered into a contract with the United States acting through the Alley Dwelling Authority[1] for the construction of the Lily Ponds Housing Project, Washington, D. C. Respondent's claim arises out of the Govern-

---

1 The name was later changed to "National Capital Housing Authority"; for convenience the name Alley Authority will be used throughout this brief interchangeably with the name "National Capital Housing Authority".

ment's requirement that Respondent work its forces and those of its subcontractors on a 48-hour per week basis, instead of a 40-hour per week basis. The Court of Claims found that the Respondent prepared and submitted its bid on the basis of a work week of 40 hours, with no allowance for overtime, that being consistent with the practices and principles then prevalent on public work (R. 5). Respondent contended (and it was so found by the Court) that in order to accomplish a work week of 48 hours, any work performed after 5 o'clock on Friday and before 8 A.M. Monday, was overtime, and paid for at 1-1/2 times the regular rate.

The overtime question came about in the following manner: On February 9, 1943, Executive Order 9301 (8 F. R. 1825) was promulgated. It provided in part as follows:

> "1. For the duration of the war, no plant, factory or other place of employment shall be deemed to be making the most effective utilization of its manpower if the minimum workweek therein is less than 48 hours per week.
>
> 2. All departments and agencies of the Federal Government shall require their contractors to comply with the minimum workweek prescribed in this order and with policies, directives, and regulations prescribed hereunder, and shall promptly take such action as may be necessary for that purpose."

Immediately after the issuance of Executive Order 9301, Respondent orally inquired of the Alley Authority representatives at the site of the work whether it would require the contract work to be put on a 48 hour work week. Respondent was thereupon advised that it would be required to go on a 48-hour work week, and upon requesting a writ-

ten order directing it to so proceed, the Alley Authority's representatives stated that the order would come through in due course. On May 8, 1943, the order actually was issued by the Contracting Officer in charge. Within a week of February 9, 1943, Respondent had called its subcontractors together, told them of the foregoing requirements, and instructed them to comply (R. 12 and 13).

Saturday or Sunday was generally considered and accepted as the sixth day of a 6-day 48-hour work week by both plaintiff and its subcontractors and the laborers and mechanics employed by them. It is conceded that the 48-hour work week was so interpreted by the building trades; that no matter how few hours a mechanic or laborer worked between Monday and Friday, he nevertheless was paid time and a half if he worked Saturday or Sunday. This in spite of the fact that it was the experience in the building trades generally that efficiency on the sixth day dropped, it being estimated that the drop on the Lily Ponds Project was 25% (R. 14). Thus, the effect of the order to put the work on a 48-hour weekly basis was not only more costly insofar as the wages paid on Saturdays and Sundays were concerned, but the labor productivity received for paying time and a half was far below that paid for at the regular rate.

Apparently the Alley Dwelling Authority recognized the validity of the Respondent's claim, for when Respondent received the order to proceed on a 48-hour a week basis, and then wrote to the Alley Authority under date of May 19, 1943, requesting that it be advised how the additional costs were to be paid, and whether payment would be made from time to time or at the conclusion of the job, the Contracting Officer advised Respondent by letter dated May 25, 1943, under what circumstances payment would be made.

The conditions were that *the Alley Authority* make findings that:

1. The Contractor based his bid on a 40-hour week.

2. The Contractor could at the current rate of progress, complete the contract within the required time by working a 40-hour week.

3. The Contractor agrees in writing to a change order shortening the construction period on an equitable basis.

From time to time Respondent submitted its statement of additional costs necessitated by the overtime order, and on October 27, 1943, submitted its complete claim in the amount of $19,247.19.

There then followed some correspondence in which the Alley Authority took the position that Respondent had failed to show that the Government had benefited by the 48-hour work work or that the construction time was shortened (R. 18-19).

It is highly significant that the Alley Authority for the first time annexed the new condition "that it had not been shown that the Government benefited materially by the extra work". This was no part of any prior agreement written or oral.

Thereafter and on January 31, 1944, the Alley Authority wrote the Respondent requesting further information. On March 23, 1944, Respondent's attorneys wrote to the Alley Authority requesting a review of the evidence already submitted.

Again it is highly significant *that the Alley Authority made no findings whatsoever* and instead turned the entire matter over to the Regional Director of the Federal Public

Housing Authority with the result that under date of April 18, 1944, it forwarded to Respondent a copy of a ruling received by it from the Regional Director denying the claim on the following grounds (R. 5-6):

> "1. In order for the contractor to have completed his work under his contract within the time specified, it would have been necessary for him to have worked his employees 48 hours a week; and
>
> 2. The National Capital Housing Authority did not issue any orders requiring the Contractor to work his employees 48 hours per week. The Contractor's compliance with the aforementioned Executive Order was an obligation imposed upon him by the Government acting in its sovereign capacity."

The Court of Claims found that the Respondent satisfied all the conditions, stating:

> "We think the Plaintiff did satisfy the conditions. The only one seriously in question is the one with regard to shortening the time of performance. While it is impossible to determine with exactness just how much time the Plaintiff was entitled to for completion of the contract, the Government has caused this situation by its failure to do what the contract required of it" (R. 29-30).

It is most significant that after the judgment of the Court of Claims the Government moved for a new trial and urged that the error of the Court of Claims lay:

> "1. In upsetting the Finding of the National Capital Housing Authority that Plaintiff had not met the

terms and conditions specified as a prerequisite to reimbursement."

The Government's application was without basis *because of the fact that the record is completely devoid of any evidence that the National Capital Housing Authority which was in charge of the job, ever made any Findings whatsoever.*

The record is clear that (1) Respondent completed well in advance of the allotted time (2) the National Capital Housing Authority not only failed to make any Findings as provided for by the letter of May 25, but even failed to act on any requests for extensions of time made by the Respondent. In an effort to circumvent these facts Petitioner would have it appear that the Court of Claims acted merely because of the Authority's failure to show what the facts were. We will show that contention to be without merit. The Court of Claims found as a fact that the Plaintiff not only satisfied all the conditions of the letter of May 25, and that if there were any doubt about it the fault lay with the Government because of its failure both to perform its contract functions or to show the contrary of what Respondent testified to. We will show that there could have been no conceivable question as to the fact that the respondent had completed long before the acceptance date of September 11, and that the action of the Government in this case was not only arbitrary but capricious in the extreme.

Reasons for Denying the Writ

Respondent has contended throughout that in putting the work on a 48-hour work week basis it did so on the oral and written directions and promises of the Alley Author-

ity. Apparently the Government conceded as much for it urged in the Court below that there were no sanctions whatsoever attached to failure to comply with Executive Order 9301.[2] Accordingly, the Government throughout was forced to concede that if the evidence indicated that it directed Respondent to comply with the 48-hour work week and if there was inherent in said direction a promise of payment upon conditions therein outlined payment should be made.

It is respectfully submitted that the Court having found as a fact that orders were given and a promise of payment made (even if we assume it was a conditional promise) the Government was properly held liable if the conditions were actually complied with. We are not dealing, as suggested by the Petitioner at page 15 of his instant brief, with questions of quality or personal satisfaction as to work performed. On the contrary, we are dealing with the question as to whether or not an agreement conditional or unconditional has been complied with. Surprisingly enough Petitioner wholly overlooks the fact that the Alley Authority which was required by its letter of May 25th *to make the requisite findings never made any determination.* So obvious was the justice of Respondent's position that the Alley Authority did nothing and passed the buck to the Regional Director.

In nearly every case before the Court of Claims where a determination as to performance is involved, we have findings made by the Contracting Officer or by the Agency in charge of the work and then the decision of Head of the Department on appeal by the Contractor. But in this case, the very primary findings were never made and yet the Petitioner now has the temerity to assert that the

---

2 Note page 145 of the Government's Brief in the Court of Claims.

Court of Claims may not examine the facts and arrive at a conclusion as to whether the requisite conditions of the agreement were performed, even though the agreement provided that the Contracting Officer was to make such findings and it failed to do so.

In order to avoid the effect of the finding made by the Court of Claims that an order was given and promise of payment made, even though conditional, the Government now distorts what happened and would suggest that all the Government did was to negotiate or to make a proposal for negotiation of a supplementary agreement and that during all this time the parties were simply considering whether or not to enter upon an agreement and upon what terms to do so. Thus by the simple device of referring to the agreement to pay if conditions were fulfilled as an agreement which but seeks ultimately to make a supplemental contract, Petitioner now argues that the Court of Claims was in error when it undertook to decide what the terms of that supplemental contract were to be. The science of semantics was never more abused. The Court did not undertake to decide what the terms of the agreement should be. The Court of Claims merely held that an agreement existed, albeit a conditional one, and under the circumstances properly considered whether the conceded conditions of the agreement had been complied with. It having appeared that the Government failed to take the necessary steps so that an equitable decision might be had as to whether or not the conditions of the agreement had been complied with, the Court of Claims did the only thing it could do under the circumstances and that was weigh the evidence and determine from it whether or not the conditions had been in fact complied with. Petitioner would give this Court the impression that the Court of Claims held the conditions complied with simply because the Government had failed

to act in considering certain requests for extensions of time. That is not the fact. The Court of Claims went into the entire record and from it determined that the conditions had been complied with. In an effort to avoid the effect of the record, Petitioner now makes the most unfair argument that the Respondent was still performing the contract on October 13, 1943, even though the contract had been fully accepted as of September 11, 1943. The work after even Sept. 1 was merely the usual cleaning up and patching items which never hold up acceptance. That was never disputed at the trial.

It was conceded that there were only 500 dwelling units in the entire project. Exhibits 37 to 49 are a summary of the Authority's letters showing when each of the 500 units were accepted. These letters show that the Authority had concededly accepted all of the buildings as of September 1st and had accepted over 400 of the 500 dwelling units as of July 29 (Exhibit 46) and as of August 6 had accepted 476 (Exhibit 47). *This was 36 days in advance of the so-called final acceptance date of September 11, 1943.*

In view of all this, the Record cries aloud that the Regional Director was not only arbitrary in his view, but that he had closed his eyes to the entire situation. How he could conceivably have ruled that the Contractor would have been compelled to work a 48-hour week if it were to complete on time is incomprehensible in the light of the Contracting Officer's own letters indicating actual acceptance of 95% of the dwelling units by August 6th, 36 days ahead of the final certificate date. This August 6th date is the Government's date, not ours. It needs but little imagination to realize that actual completion precedes by a considerable number of days the Government Inspector's recognition of completion.

Bearing in mind the state of completion at the known dates, we have but to ask ourselves, what would have been

the Contractor's position had he failed to complete within time? Addenda No. 2 attached to the contract, being Exhibit "1", indicates that the liquidated damages for delay was $1.00 per dwelling unit per day. This is found under the first paragraph of Addenda No. 2 as follows:

> "SPECIAL CONDITIONS, Page 42, Art. 2, Liquidated Damages, Line 7, after 'One ($1) dollar', insert 'per dwelling unit per day'."

By August 6th there were but 24 units still to be accepted, and for which the Contractor was still responsible. Thus $24. per day would have been the limit after August 6th. Even if we took an additional 36 days, the limit of our damage would have been less than $1,000. Yet the Court found we spent at least $16,209.75. Is it then reasonable to assume that having almost 36 days left with 24 units to deliver that the Contractor could not have finished the job within the contract time had it worked 40 hours a week? This, of course, takes no account of all the other requests for extensions of time which the Alley Authority did not act on. It is obvious that neither the Alley Authority nor the Regional Director made any serious effort to consider the matter on the merits, but rather relied on their contention that the Government acted in its sovereign capacity.

How far the Director went in his complete disregard of the facts is best evident from the Regional Director's statement that the Authority did not issue any order requiring the 48-hour week. Firstly, the Authority itself never made such a claim. Secondly, it was in direct contradiction of the Authority's letters which clearly directed the 48-hour week.

Petitioner contends that it was incumbent upon us to prove that the requests for extensions were meritorious.

To begin with, the record shows that we were so far ahead of the contract time, even without the extensions, that the Authority's finding was purely arbitrary. Secondly, even if we were to assume that it was incumbent upon us to show that our requests were meritorious, the Record indicates that very fact. The Authority's daily reports were at the trial. We offered a number of them to show that our requests for weather extensions were in order. We could do no more. As the Government now states, in its brief, these extensions alone would have given us an additional nine days. Certainly in 1943 there were excusable delays in obtaining materials which would have entitled us to some extensions had the Authority performed its duty and acted thereon. If only five days were involved this would have brought the official completion date to some time in October.

It seems to us that the "contract time" as applied in this case, has created much confusion. As we have heretofore shown, the instant contract provided for the imposition of liquidated damages of $1.00 per dwelling unit per day. That was in recognition of the fact that the Government would and was taking part of the project over for actual occupancy months before it took over the last unit. In the light of this situation it would, of course, be a misnomer to say that the contract as such was not completed until the last day when the last unit was accepted. Rather must we view this job from the standpoint of the condition of the job at the various times the units were taken over. We now know definitely that as of August 6th, 476 of the 500 units were accepted by the Government for occupancy. Concededly the Contractor had until September 11th to finish without giving any consideration to the requests for extensions which were not acted upon. If the Contractor took 30 days beyond the September 11th date he would have to pay liquidated damages of $24.00 per day or $720. at most.

Does that in any equitable or legal sense counterbalance the $16,209.75 damages found by the Court? The question answers itself. Furthermore, all units were accepted by the Government as of September 1st, ten days before the official date of September 11th. It is therefore but fair to infer that these ten days plus the other extensions to which plaintiff was entitled would easily have absorbed any and all work performed by the Contractor on Saturdays or Sundays, with all the attendant inefficiency and lack of production on these overtime days. As the Court stated in its findings, the efficiency had been known to drop 75%, and on Lily Ponds it was estimated at 25% (R. 14). The trouble was that the National Capital Housing Authority really made no effort to review this phase of the case, but rather relied on the Regional Director's ruling that it had a right to order the work in the Government's sovereign capacity.

Respondent made every effort to show that the Regional Director was in error, as that was exactly what was in issue throughout. Most glaring is the fact that the Government had Mr. Isham, Chief Field Supervisor for the National Capital Housing Authority, on the witness stand. If the Government intended to urge that the overtime was necessary in order to complete on contract time or to avoid liquidated damages, that should have been elicited from Mr. Isham, but the fact is that no attempt in that direction was ever made. Having had the opportunity to contradict Respondent's direct evidence by the very man whom it placed in charge of the field work, and having failed to do so, it seems to us that Petitioner's present argument comes in poor grace.

In conclusion we beg leave to refer to Petitioner's argument at the closing of his brief that litigation by government contractors who have been administratively denied relief will undoubtedly be stimulated by the holding of the

Court of Claims that a contracting agency's rules regulating the allowance of discretionary relief constitute a contractural offer whose acceptance will be judicially determined.

Here again the Petitioner attempts to involve us in a class litigation when the fact is that our case is *sui generis* in the most absolute sense in which that term can be used. The trouble with the Petitioner's argument is that it involves a complete misstatement of what happened here. We are dealing in the instant case with a situation where the contracting officer, both orally and in writing, directed the work to proceed on a forty-eight (48) hour basis with a promise of a payment (R. 12). Thereafter the contracting officer advised Respondent as to what conditions Respondent must meet before payment will be made. It may well be that having ordered the work to proceed and having promised payment, the contracting officer had no right to impose any conditions. But we do not presently urge that point. We do say, however, that having laid down certain conditions, namely, that the contracting agency make certain findings, it was incumbent on the contracting officer to make the findings in a fair and equitable manner. If the contracting officer failed to make the findings, as in the case at bar, or if the contracting officer acted in an arbitrary or capricious manner, the Court of Claims had a right to step in and act.

To argue as Petitioner does that the instant judgment of the Court of Claims greatly undermines the finality of hundreds of War and Navy Department denials of request for relief only raises the usual bugaboo when no argument on the merits is available. The letter of May 25th, on which Petitioner lays great stress clearly, says:

"The Alley Dwelling Authority has made a finding that * * * (R. 35)." The Alley Dwelling Authority failed to make

any findings. Instead the Regional Director capriciously and arbitrarily made his omnibus ruling. That was not his function. If other Government representatives have adopted the same high handed attitude in other instances, which we doubt, then it is about time that they too realize that in their contractual dealings they must apply the same rule of fairness which the law requires when private citizens deal with one another.

It is respectfully submitted that this case rests on its own facts and involves no basic principles which require the review of this Court.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

August , 1948.

M. CARL LEVINE, ~~MORGULAS & FOREMAN~~,
Attorneys for Respondent.

DAVID MORGULAS,
Of Counsel.

CERTIORARI DENIED